Supreme Court, U.S.
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No. 95-1839

In The

Supreme Court of the United States

October Term, 1995

DONALD McDONALD,

Petitioner,

vs.

KING COUNTY,

Respondent.

Petition For Writ Of Certiorari
To The Washington Court Of Appeals, Div. I

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an administrative rule violate substantive due process when it prohibits the creation of new building lots on steep slopes and an appeal to an independent hearing examiner is provided?

2. Is there a rational relationship between health and safety concerns related to development on steep slopes and an administrative rule that prohibits the creation of new building lots on such steep slopes?

3. Does it violate procedural due process for a County to require studies addressing health and safety concerns related to development on steep slopes, where an appeal of the requirement to perform such studies is available and the applicant does not avail himself of such an appeal?

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I. STATEMENT OF THE CASE

On November 20, 1990, petitioner applied to King County for short plat approval to divide his property located on a very steep hillside into four building lots. Very early in the review process, King County identified several serious concerns regarding petitioner's proposed development, including the fact that petitioner's property was extraordinarily steep. Pursuant to established authority, King County required additional information from petitioner in the form of special studies addressing the significant health and safety concerns raised by his proposed development on the steep hillside.

Despite the availability of an administrative appeal of the requirement to do the special studies, petitioner did not appeal this requirement. Rather, petitioner refused to do the studies necessary to evaluate the health and safety risks associated with his development proposal. The King County Building and Land Development Division ("BALD") thereupon denied petitioner's short plat application.

Petitioner appealed the denial of his short plat application to the King County Hearing Examiner. The Hearing Examiner held a quasi-judicial public hearing. At this hearing, witnesses for the petitioner and county employees testified and were cross-examined with regard to petitioner's development proposal. Petitioner asked the Hearing Examiner to approve his short plat application, despite the fact that he had not provided the information necessary to evaluate the health and safety risks raised by his development proposal.

Petitioner attempted to rely on information produced at the hearing before the Hearing Examiner to show that four single-family homes could safely be built on his property. The information produced at the hearing did not even *address* the issues associated with removing vegetation and building four homes on a very steep hillside, let alone evaluate the complex technical issues raised by petitioner's development proposal in sufficient detail to substitute for the required special studies.

The Hearing Examiner denied petitioner's request to approve his short plat application on two grounds; both because it violated a rule adopted by BALD prohibiting short plats on slopes exceeding 40 percent, and because petitioner failed to provide the information necessary to evaluate whether petitioner's development proposal could be safely accomplished.

Petitioner appealed the Hearing Examiner's decision to King County Superior Court asking that this decision be reversed and his short plat approved. King County Superior Court, per Kathleen Learned J., upheld the Hearing Examiner's decision on both grounds. Petitioner moved for reconsideration. His motion for reconsideration was denied.

Petitioner appealed the trial court decision to the Washington State Court of Appeals, Division One, again asking that the Hearing Examiner's decision be reversed and that petitioner's short plat application be approved. The Court of Appeals denied his appeal. The Court of Appeals was unanimous in concluding that the Hearing Examiner appropriately refused to approve petitioner's short plat application in the absence of the information

necessary to evaluate the significant health and safety risks associated with petitioner's development proposal. The Court of Appeals also upheld, by a 2-1 vote, the Hearing Examiner's decision to deny petitioner's short plat application on the basis of BALD's rule prohibiting short plats on slopes exceeding 40 percent.

Petitioner moved the Court of Appeals for reconsideration of its decision. The Court of Appeals denied this motion.

Petitioner sought review of the Court of Appeals decision in the Washington State Supreme Court. Review was denied.

Petitioner now seeks review in this Court, pursuant to petition for writ of certiorari.

II. ARGUMENT

The instant case meets none of the criteria guiding this Court's exercise of discretion in deciding which cases to accept for review pursuant to a petition for writ of certiorari. A petition for writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10. There are no compelling reasons present in this case.

Petitioner asserts two reasons for the Court to grant review in this case, each of which is without merit.

A. The Washington Court of Appeals did not decide a federal question in a way that conflicts with decisions of this Court.

Petitioner asserts that the Washington Court of Appeals decided a federal question in this case in a way that conflicts with decisions of this Court. Petition for Writ of Certiorari, pp. 8-12. Petitioner alleges that the Washington Court of Appeals based its decision on an irrebuttable presumption, which "long have been disfavored under the Due Process Clauses . . . " Petition for Writ of Certiorari, p. 8. Petitioner's allegation is wrong on several counts.

First, the Washington Court of Appeals unanimously based its decision on an alternate ground of decision. Petitioner refused to demonstrate that his proposed development on a steep hillside could be safely accomplished – and yet petitioner sought approval of his short plat application. The King County Hearing Examiner acted appropriately in denying petitioner's application.

Every decision maker that has reviewed this matter (from the King County Hearing Examiner, to the trial court judge, to the Washington State Court of Appeals) has agreed that petitioner's request that his short plat application be approved without information demonstrating his proposed development could be safely accomplished was appropriately denied by King County. Even Judge Agid in the Washington State Court of Appeals, who dissented from part of the reasoning in the court's decision, concurred in the result that petitioner's short plat application was appropriately denied. Thus, a resolution of this case did not require that a federal

question even be decided, let alone decided in a way that conflicts with prior decisions of this Court.

Second, petitioner has not shown a property right protected under a substantive due process analysis. Petitioner seeks to subdivide his property into multiple building lots in order to increase the market value of the property. He has been denied no fundamental attribute of property ownership, such as the right to exclude others from his property or the right to put his property to an economically viable use. He simply wishes to maximize the amount of profit he can make on the development of his property. Petitioner asks this Court to second guess the policy choice made by King County in order to protect his "right" to make more money on the development of his property. No prior decision of this Court supports the view that the substantive limitation inherent in the concept of due process of law restricts the policy choices a local government can make with regard to applications to maximize the number of building lots on a parcel of land.

The cases petitioner cites in his Petition for Writ of Certiorari are not land use cases, and certainly are not cases establishing a constitutionally protected right to maximize the profitability of real property. *See* Petition for Writ of Certiorari, p. 8. Rather, this Court's prior decisions expressing constitutional concerns regarding the use of conclusive presumptions all deal with such fundamental rights as the right to vote, *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed. 2d 274, 92 S.Ct 995 (1972), the right to custody of one's children, *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct 1208 (1972), or the right of

pregnant women to work, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 39 L.Ed. 2d 52, 94 S.Ct 791 (1974).

Petitioner cannot show that *all* conclusive presumptions violate the substantive limitation inherent in the due process clause. Young persons are conclusively presumed to be mature enough to vote, drive, and drink alcoholic beverages only after reaching certain threshold ages. The due process clause does not require hearings at which particularly mature individual young persons have the opportunity to present evidence showing that they are, in fact, capable of performing these responsibilities adequately at ages younger than the otherwise applicable threshold ages. Not all conclusive presumptions violate due process rights. Petitioner has not shown the infringement of a constitutionally protected right in this case.

Third, petitioner has provided no information suggesting that the presumption embodied in the administrative rule at issue in this case is anything but perfectly reasonable. Petitioner has the burden to prove the unconstitutionality of the administrative rule in this case. Petitioner has come forward with no evidence suggesting that the 40 percent slope threshold embodied in BALD's administrative rule does not appropriately delineate the point at which slopes become too steep to support multiple homesites. The record in this case is woefully inadequate to support petitioner's claim. There is no basis for a reviewing court to second guess the wisdom of the 40 percent threshold contained in the administrative rule at issue in this case.

B. Petitioner has not demonstrated the existence of an administrative remedy so burdensome as to violate procedural due process.

Petitioner complains that it would have been futile for him to commission the studies necessary to demonstrate that his proposed development could be safely accomplished. There are several reasons that this complaint is without merit.

First, if petitioner felt he should not have to prepare the studies required by King County, he should have availed himself of the administrative appeal provided specifically to challenge the requirement to do such studies. Having failed to avail himself of this administrative remedy, petitioner cannot now complain he should not have had to provide the required studies. Petitioner characterizes the application in this case of the requirement that one exhaust administrative remedies before bringing a judicial appeal as "a prime example of the insidious and reprehensible use of the remedies doctrine as a 'roadblock' to the challenge of unconstitutional regulations." Petition for Writ of Certiorari, p. 13. King County considers the exhaustion requirement to be neither "insidious" nor "reprehensible." Rather, the requirement that administrative remedies be exhausted is based upon sound considerations of judicial and administrative economy.

Second, petitioner asked the King County Hearing Examiner to approve his short plat application without the required studies. The Hearing Examiner, quite reasonably, denied this request. The Hearing Examiner's decision was not based on petitioner's failure to exhaust

administrative remedies, it was based on petitioner's failure to demonstrate his proposed development could be safely accomplished. The Hearing Examiner's decision was a reasonable response to an unreasonable request by petitioner. Petitioner cannot now be heard to complain that he should have asked for different relief. Petitioner asked the Hearing Examiner to approve his short plat application without the special studies. The Hearing Examiner's denial of this request did not violate petitioner's due process rights.

Third, petitioner has made no showing that providing the required information regarding the safety risks inherent in his proposal to develop a very steep hillside would have been futile. Petitioner has shown that BALD had a rule that it would not approve short plats on steep slopes and that two employees of BALD said the agency would deny petitioner's application with or without the required studies. The decision at issue in this case, however, is the decision of the Hearing Examiner. Petitioner has provided no evidence suggesting that the King County Hearing Examiner would not have considered the studies, had petitioner chosen to do them. Indeed, the Examiner specifically cited the lack of studies as a reason for denial of petitioner's application.

The final decision made on behalf of King County with regard to petitioner's short plat application was not made by BALD, it was made by the King County Hearing Examiner. The Hearing Examiner is independent of BALD, and in fact independent of the executive branch of government in King County. The Hearing Examiner is an arm of the King County Council, the legislative branch of King County government. The Hearing Examiner makes

decisions on behalf of the Council with regard to certain, specified land use applications.

Petitioner has made no showing that the administrative rule adopted by BALD would have been followed by the Hearing Examiner, particularly if petitioner had come forward with evidence showing that his development could be safely accomplished. Instead, petitioner provided no information demonstrating the safety of his development proposal, and yet still requested that his proposal be approved. The Hearing Examiner simply denied his unreasonable request.

Petitioner was afforded a hearing regarding his development proposal. The hearing was not a sham, it was a real hearing at which petitioner was able to present witnesses and cross-examine County employees. The fact that the Hearing Examiner held against petitioner does not establish that petitioner's constitutional right to procedural due process was violated.

III. CONCLUSION

Petitioner has not carried his burden to demonstrate a compelling reason for this Court to accept review of the instant case. For the reasons stated above, King County respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

DATED this 11th day of June, 1996.

Respectfully submitted,

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